MILLENIUM-WESTMONT PTE LTD

v.

DATO' JOSEPH CHONG CHEK AH & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[CIVIL SUIT NO: D8-22-1181-2000]
29 MARCH 2005

CIVIL PROCEDURE: *Writ of summons - Service out of jurisdiction - Whether plaintiff obtained leave to issue notice of writ of summons out of jurisdiction - Whether failure to obtain order for leave a mere irregularity - Whether service of writ should be set aside - Rules of the High Court 1980, O. 6 rr. 5, 6(1), O. 11 r. 4 - Practice Direction No. 2 of 1982*

CIVIL PROCEDURE: *Jurisdiction - Forum conveniens - Proper forum for case to be tried - Whether Malaysian or Singaporean courts - Service out of jurisdiction - Whether 3rd defendant a necessary and proper party to action - Courts of Judicature Act 1964, s. 23(1)(b) - Rules of the High Court 1980, O. 11 r. 1(1)(j)*

This was the plaintiff's appeal against the decision of the learned senior assistant registrar allowing the 3rd defendant's application to set aside a notice of writ of summons that was to be served out of jurisdiction. The plaintiff, a Singaporean company in liquidation, had brought a claim against the 1st and 2nd defendants for breach of their fiduciary duty as the plaintiff's shadow director and managing director respectively. The 3rd defendant, a Singaporean, was a remisier with one of the foreign companies that were involved in the transaction that had resulted in the alleged breach of fiduciary duty. The relevant issues in the present appeal requiring determination were: (i) whether Singapore was the proper forum for the case to be tried; and (ii) whether the plaintiff had obtained leave to issue the notice of writ of summons out of jurisdiction.

Held (dismissing the plaintiff's appeal):

[1] The fact that there were concurrent proceedings against the 1st, 2nd and 3rd defendants in Malaysia on the same connected issues concluded the issue of *forum conveniens* in the plaintiff's favour. This court had jurisdiction under s. 23(1)(b) of the Courts of Judicature Act 1964 as one of the several defendants resided or had his place of business in Malaysia. The 1st defendant had submitted to the jurisdiction of this court. He had

filed a defence to these proceedings and had made no application to set aside or strike out the suit. Service out of jurisdiction was made on the ground that the 3rd defendant was a necessary and proper party to this action under O. 11 r. 1(1)(j) of the RHC. Since the action against the 1st defendant was properly brought, it followed that the 3rd defendant was also a proper party to this action. (p 154 e-g)

[2] The application granted was for leave to issue a notice of writ out of jurisdiction that was made under O. 11 r. 4 of the RHC instead of O. 6 r. 6(1) of the RHC. Perhaps realising that O. 11 r. 4 of the RHC was for a grant of leave to serve a notice of writ out of jurisdiction, the plaintiff deliberately applied to amend the order from "untuk kebenaran mengeluarkan satu notis writ" to "untuk kebenaran menyampaikan satu notis writ saman". This folly of the plaintiff in amending the order remained unexplained. It was converted from leave to issue a notice of writ out of jurisdiction to a notice to serve a notice of writ out of jurisdiction. This so-called irregularity was not due to inadvertence but done intentionally. The plaintiff should have known that the requirements of O. 6 r. 6 of the RHC and Practice Direction No. 2 of 1982 had not been complied with. Service of a writ out of jurisdiction without first obtaining leave to issue the writ under O. 6 r. 5 of the RHC was an irregularity of such importance that the court was unlikely to waive or disregard it. Thus, since there was no order for leave to issue a writ out of jurisdiction, the learned senior assistant registrar was right in setting aside the service of the writ on the 3rd defendant. (pp 155 h, 156 a-b, h & 157 a)

Case(s) referred to:

American Express Bank Ltd v. Mohamed Toufic Al-Ozier & Anor [1995] 1 CLJ 273 SC ***(refd)***

Classic Video Distribution Sdn Bhd v. Asia Television Ltd [1988] 3 MLJ 421

Credit Agrocole Indosuez v. Uncof Ltd & Ors [2004] 1 Lloyds Rep 196 ***(foll)***

Seasina Sdn Bhd v. Saab Seania AB & Anor [1986] 1 MLJ 430 ***(foll)***

The Spiliada [1987] AC 460 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(b)

Rules of the High Court 1980, O. 1A, O. 2 r. 1(1), O. 6 rr. 5, 6(1), O. 11 rr. 1(1)(a)-(l), 4, 6(5)

For the plaintiff - RS Nathan (Nad Segaram with him); M/s Shearn Delamore & Co
For the defendant - Lim Koon Huan; M/s Skrine

Reported by Suresh Nathan

JUDGMENT

Abdul Wahab Said J:

The plaintiff appealed against the SAR's decision on 14 June 2002 allowing the 3rd defendant's application in encl. 19 to set aside the notice of writ of summons that is to be served out of jurisdiction dated 22 December 2000 because of irregularity.

The plaintiff is a Singaporean company in liquidation. The plaintiff's claim against the 1st and 2nd defendants is for breach of their fiduciary duty as the plaintiff's shadow Director and Managing Director. Even though Wing Tiek Holdings Bhd and Westmont Sdn Bhd are companies that the 1st defendant held an interest in, the transaction that breached the fiduciary duty involves foreign companies, namely Vickers Ballas Pte Ltd and Kim Eng Securities (Hong Kong Ltd) and Kian Hin (Singapore). The 3rd defendant, a Singaporean, is a remisier with Kian Hin (Singapore) while the 4th defendant is a Singaporean company. The alleged breach is that the 1st defendant caused the plaintiff to trade in Wing Tiek Holdings shares in the KLSE through the three above named stock broking firms.

The plaintiff obtained financing to trade in shares in Kian Hin from Standard Chartered Bank and Bank of Tokyo-Mitsubishi on 25 July 1997 (even though it is not the purpose for which the above named two banks had granted the loans for).

As the 1st defendant had failed to take steps to ensure that the Wing Tiek Holdings shares are properly paid for and delivered to the plaintiff, the plaintiff had incurred losses amounting to S$7,951,320.43 (at the time of filing of summons). The above amount is the difference between the contra gain and contra loss and accrued interest for late payment pertaining to trading through the plaintiff's account in Kian Hin.

The plaintiff claims that the 3rd defendant is responsible as constructive trustee because he was said to have abetted and facilitated the 1st and 2nd defendant's dishonest and fraudulent scheme. The plaintiff also claimed that the 1st, 2nd and 3rd defendant was involved in a conspiracy.

The plaintiff had earlier filed a civil suit against the same parties in the High Court of Singapore on 31 March 2000 for a similar claim. The suit was never served on the 3rd defendant. The claim was discontinued in the Singapore High Court and plaintiff filed the suit instead here for the same relief. The 3rd defendant had filed conditional leave and thence applied to set aside the writ.

The 3rd defendant in his affidavit supporting the application contended the following:

(a) The plaintiff failed to comply with O. 6 r. 5 and 6 RHC and Practice Direction 2 of 1982, on issuance of writ.

(b) The plaintiff had not specified any ground or grounds as set out in O. 11 r. 1(1)(a)-(l) of the RHC in its affidavit in support of the application for leave to serve out of jurisdiction.

(c) The notice did not comply with provisions of O. 11 r. 6(5) RHC and that the order of 13 December 2000 granting leave to serve the summons out of jurisdiction did not comply with Form 13 RHC.

(d) *Forum non conveniens.*

Taking the issue of *forum non conveniens* first, the 3rd defendant said that he was merely carrying out orders of the 2nd defendant who had the authority to give instructions pertaining to the management of the plaintiff's account. The plaintiff had lawfully opened the trading account with Kian Hin and the 3rd defendant was a remisier for the share trading account of the plaintiff.

It was also contended that any allegation of wrongful act and conspiracy are matters governed by the law and jurisdiction of the Singapore courts. This is because all relevant facts and alleged transactions occur in Singapore. The plaintiff had also claimed that the 3rd defendant had failed to comply with para. 7(b) of the Singapore Stock Exchange Regulations.

The plaintiff's Trading Account and the relevant records and documents are with Kian Hin Singapore. The plaintiff opened an account with Kian Hin after a meeting and discussion between the 2nd defendant and Kian Hin's Managing Director. All the documentations on the plaintiff's account with Kian Hin was done by the 3rd defendant's assistant, Rosalind Yeo May Ling. Therefore, it is clear that Singapore is the proper forum since the witnesses are from Singapore.

The 4th defendant, a Singaporean company, had been wound up and removed from the list of the Singapore Registrar of Companies. The documents and relevant records on the said transactions are in Singapore.

The test for *forum non conveniens* is whether there is some other forum where the case can be tried more suitably for the interests of all parties and the ends of justice: *The Spiliada* [1987] AC 460. The principle in The Spiliada has been applied in Malaysia in the Federal Court decision of *American Express Bank Ltd v. Mohamed Toufic Al-Ozier & Anor* [1995] 1 CLJ 273.

The 3rd defendant says that Singapore is the proper forum. However, that is only from the 3rd defendant's point of view. The court must also take into consideration the interest of other parties and the prejudice that it would cause to the plaintiff. The suit is primarily instituted against the 1st defendant who is a Malaysian resident and who has submitted to the jurisdiction of this court. The claim against the 3rd defendant is that he dishonestly facilitated the 1st defendant's breaches of fiduciary duty and conspired with him against the plaintiff. The 1st defendant has not contested the jurisdiction of this court. To sue the 3rd defendant separately in Singapore would give rise to extreme inconvenience and increased costs. There would be a danger of conflicting decisions. This cannot be allowed because the claim against the 3rd defendant is inextricably linked to the claim against the 1st and 2nd defendants. In *Credit Agricole Indosuez v. Uncof Ltd & Ors* [2004] 1 Lloyds Rep. 196, Cooke J said that: "... the fact of continuing proceedings in England against other defendants in the same or closely allied issues virtually concluded the question, since all courts recognized the undesirability of duplication of proceedings ..."

Following *Credit Agricole Indosuez*, the fact there are concurrent proceedings against the 1st, 2nd and 3rd defendants in Malaysia on the same connected issues concludes the issue of *forum non conveniens* in the plaintiff's favour.

This court has jurisdiction under s. 23(1)(b) Courts of Judicture Act 1964 as one of the several defendants resides or has his place of business in Malaysia. The 1st defendant had submitted to the jurisdiction of this court. He had filed a defence to these proceedings and has made no application to set aside or strike out the suit. Service out of jurisdiction is made on the ground that the 3rd defendant is a necessary and proper party to this action under O. 11 r. 1(1)(j) RHC which allows for service out of jurisdiction. Since the action against the 1st defendant is properly brought, it follows that the 3rd defendant also is a proper party to this action.

Issue (a) (b) And (c)

The 3rd defendant's counsel had contended that leave was never given by the deputy registrar on 13 December 2000. The parties had referred to the notes of proceedings dated 13 December 2000. Enclosure 7 prayed that "Plaintiff diberi kebenaran untuk mengeluarkan satu Writ Saman Notis Yang Hendak Disampaikan Di luar Bidangkuasa" under O. 11 r. 4 RHC as against *inter alia*, the the 2nd, 3rd and 4th defendant. It showed that the plaintiff's counsel had come again at 2.30pm and had orally made an application to amend SIC encl. 7, para. 1 that was granted that morning to read, "... untuk menyampaikan satu notis writ saman." This application was allowed by the deputy registrar.

With the amendment, the 3rd defendant's counsel submitted that the plaintiff had only applied to serve the summons out of jurisdiction, while the plaintiff's counsel contends that leave to issue the notice of writ was obtained earlier.

From the minutes, it is apparent that in the morning of 13 December 2000, the deputy registrar heard submissions by counsel as to why leave to issue the notice of writ should be granted. Plaintiff's counsel contended that if the plaintiff had not obtained the order to issue the notice of writ, the deputy registrar would not have sealed the notice. Furthermore, if the deputy registrar was of the opinion that this was not a proper case for the grant of leave to issue the notice of writ, he would have simply dismissed the plaintiff's application in encl. 7.

Plaintiff's counsel also submitted that failure to refer to the order granting leave to issue the notice of writ in encl. 10 is mere procedural non-compliance. What really matters is whether leave to issue the notice of writ was granted. It clearly was granted. The grounds on which leave was applied for was set out in detail in the affidavit-in-support of encl. 7.

He went on to say that the mere fact that the order in encl. 10 does not specify leave to issue notice of writ cannot constitute a valid ground to set aside the notice of writ. The breach complained of is a true 'paper breach' in its simplest form. Order 1A and O. 2 r. 1(1) RHC 1980 should be invoked in these circumstances as the 3rd defendant is not in any way prejudiced by it.

The application granted was for leave to issue notice of writ out of jurisdiction which was made under O. 11 r. 4, instead of O. 6 r. 6(1) of the RHC. Perhaps realizing that O. 11 r. 4 is for grant of leave to serve notice of writ out of jurisdiction, plaintiff deliberately applied to amend the order from "untuk kebenaran mengeluarkan satu notis writ" to "untuk kebenaran menyampaikan satu notis writ saman". This folly of the plaintiff's counsel in amending the

order remained unexplained. It was converted from leave to issue notice of writ out of jurisdiction to notice to serve notice of writ out of the jurisdiction. This so called irregularity is not due to inadvertence but done intentionally. Plaintiff should have known the requirements of O. 6 r. 6 for leave to issue of writ to be served out of the jurisdiction and Practice Direction No. 2 of 1982 had not been complied with. The order extracted did not comply with Form 13. It had intentionally omitted the words "leave to issue a notice of a writ of summons".

The order only reads:

> DAN ADALAH DIPERINTAHKAN bahawa Plaintiff diberi kebenaran untuk menyampaikan satu Notis Writ Saman terhadap Defendan Kedua, Ketiga dan Keempat di alamat berikut ...

In *Classic Video Distribution Sdn Bhd v. Asia Television Ltd* [1988] 3 MLJ 421 Abd Malek J (as he then was) said the following:

> As regards leave to issue the writ out of the jurisdiction, counsel for the Defendant contends and counsel for the Plaintiff concedes, that no application had been made under Order 6 rule 6 of the Rules but the latter argues that this is understood following the application for leave to serve the notice of the writ out of the jurisdiction under Order 11 rule 1 of the Rules. I am of the view that these are 2 separate applications on reading the two relevant orders and hold that without the leave to issue the relevant writ, the leave to serve the notice of writ could be rendered meaningless.

In *Seasina Sdn Bhd v. Saab Seania AB & Anor* [1986] 1 MLJ 430. Zakaria Yatim J held that O. 6 r. 6(1) clearly states that no writ notice of which is to be served out of jurisdiction shall be issued without leave of the court. Order 11 also states that service of a notice of a writ out of jurisdiction is only allowed with the leave of the court. The Practice Direction clearly provides the procedure for asking leave of the court for the issue of writ for service out of jurisdiction. In this case the plaintiff has failed to comply with O. 6 r. 6 of the Rules of the High Court and Practice Direction No. 2 of 1982.

Our courts exercise jurisdiction only over persons who are within the jurisdiction. A writ which is to be served out of the jurisdiction must be issued with leave of the court. Service of writ outside jurisdiction without first obtaining leave to issue the writ under O. 6 r. 5 RHC is an irregularity of such importance that the court is unlikely to waive or disregard it. There should be strict compliance of the RHC when foreign defendants are sought to be made parties to a matter within our jurisdiction. Such non compliance could not be saved under O. 1A or O. 2 r. 1(1). It is a fundamental defect as the

order had been intentionally amended to exclude leave to issue. Unless the order of the court is amended by a proper application, the order is bad for service more so it relates to submission of foreign defendants to our jurisdiction. I am not persuaded that O. 1A or O. 2 r. 1(1) could be invoked.

There being no order for leave to issue writ out of jurisdiction, the learned senior assistant registrar was right in setting aside the service of the writ on 3rd defendant. This appeal by the plaintiff is thereby dismissed with costs.